BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service.	Rulemaking 95-04-043 (Filed April 26, 1995)
Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service.	Investigation 95-04-044 (Filed April 26, 1995) **(FCC Triennial Review Nine-Month Phase)**

ADMINISTRATIVE LAW JUDGE'S RULING GRANTING MOTIONS FOR RECONSIDERATION OF SCOPE AND SCHEDULE FOR LOOP AND TRANSPORT ISSUES

Introduction

This ruling grants two motions separately filed by Verizon California Inc. (Verizon) and SBC California (SBC), incumbent local exchange carriers (ILECs) on December 30, 2003, each seeking a similar ruling. The ILECs by their motions seek reconsideration and reversal of the December 15, 2003 Administrative Law Judge's (ALJ) Ruling on Scope and Schedule for Loop and Transport Issues (Ruling). The motions were accompanied by the supplemental testimony to be submitted by each ILEC covering additional loop locations and transport routes beyond those authorized in the Ruling.

By ruling on January 2, 2004, the date of January 6, 2004 was set for responses to the ILEC motions. Responses in opposition were filed by jointly by AT&T Communications of California, Inc., MCI, Sprint Communications

Company, LP, and CALTEL. A separate joint response in opposition was filed by the "Pure UNE-P Coalition."[1]

Background

Based on the schedule set in the ALJ ruling dated October 8, 2003, the ILECs were directed to produce opening testimony on loops and transport issues on November 20, 2003. Although the ILECs presented testimony on the scheduled due date, they each characterized the testimony as incomplete. In their November 20th opening testimony, the ILECs asserted that supplemental testimony was needed to make a complete showing and to incorporate analysis on late-arriving CLEC data responses.

In response to requests made at the Loop-Transport Workshop held on December 4, 2003, and the subsequent Workshop Report filed December 11, the ALJ Ruling of December 15 was issued. The Ruling adjusting the schedule to allow Verizon and SBC to supplement their opening testimony with additional data provided by CLECs after that testimony was submitted. However, the Ruling limited use of the additional data to support of routes or locations already identified in the November 20 testimony. The ruling did not allow addition of any new transport routes or loop locations beyond those identified in the November 20 testimony. The Ruling also permitted the supplemental testimony

[1] The Pure UNE-P Coalition is composed of Anew Telecommunications Corp. d/b/a Call America, BullsEye Telecom, DMR Communications, Sage Telecom, TCAST Communications, and Tri-M Communications, Inc. d/b/a TMC Communications.

to address potential deployment limited to those loops and transport routes identified in the opening testimony. The Ruling did make provision for consideration of any such additional loops and transport locations to be taken up in a subsequent phase following the initial nine-month review, pursuant to the TRO.

Nothwithstanding the limitations in scope of supplemental testimony prescribed by the Ruling, both Verizon and SBC proceeded to include materials in their supplemental testimony mailed on December 30th that exceeded the scope of the Ruling. In its supplemental testimony, Verizon expanded the number of transport routes that it claims meets the FCC triggers from the 23 identified in November 20 opening testimony to 116. Similarly, Verizon now claims 13 customer loop locations satisfy loop the triggers, in comparison with no identified loops in its November 20th testimony.

SBC adds new loop locations in its supplemental testimony, but does not add more transport routes. SBC identified over 130 additional loop locations for which it claims the triggers are met based on information compiled from CLEC-provided data. SBC has also identified approximately another 1400 loop locations for which it claims non-impairment is shown based on its potential deployment analysis. SBC agrees to limit the basis for considering any additional customer locations in this nine-month proceeding to: (1) applying the trigger analysis based on evidence received from CLECs' own discovery responses, and (2) applying the potential deployment analysis based on the same analysis and facts used in the for those loop locations identified in SBC's November 20th testimony.

SBC characterizes its supplemental testimony on potential deployment as "narrowly focused" and applied only to those locations that: (1) fall within

dense urban wire centers and (2) are within 300 feet of existing fiber facilities in those wire centers where there is already evidence of existing alternative deployment. Within the 300-foot corridors, SBC further narrowed the scope by selecting only business and government locations that have an estimated telecommunications "spend" of $50,000. These constraints limit SBC's potential deployment analysis to 14 of the customer locations in its direct testimony.

Position of SBC and Verizon

Because the respective arguments of SBC and Verizon are very similar, they will be summarized together. SBC and Verizon argue that by limiting the scope to routes and locations presented in the November 20th testimony, the Commission will be forced to make a decision based on an incomplete picture of the current state of competition. The ILECs believe that that such an action improperly constrains the Commission and contravenes its obligations as delegated by the FCC.

Because the data that forms the basis for the additional locations and routes was not made available until after opening testimony was submitted, the parties argue that they had no opportunity to include the data in their original testimony. Moreover, Verizon argues that if the motions for reconsideration are denied, then the Commission's own efforts to obtain this discovery from all affected entities would become little more than a "massive waste of time."[2]

[2] Staff Report on December 4, 2003 Collaborative Workshop Report on Loop and Transport, Attachment F, SBC California's Comments on the December 4, 2003 Collaborative Workshop on Loop and Transport, p. 6.

Verizon argues that this additional data is of critical importance, and that there is no legitimate reason to restrict its analysis and use. Verizon argues that the Commission must analyze all of the pertinent facts, including those produced based on late-filed CLEC data in response to Commission-initiated discovery, in order to complete their delegated obligations as mandated by the TRO in this nine-month proceeding.

Verizon argues that deferring testimony regarding new transport routes or loop locations beyond those identified in the November 20 opening testimony to a "subsequent review process after the conclusion of this nine-month proceeding"[3] is unacceptable. Because the data and evidence of routes and locations meeting the FCC's triggers is now available, Verizon claims that the Commission is obligated to review and consider it without delay.

The ILECs express concern that failure to accept its supplemental testimony in the initial nine-month case will substantially delay potential relief from the FCC's finding of impairment for at least a year, and most likely longer. Verizon claims such delay "thwarts or frustrates the federal regime" adopted in the TRO and "substantially prevent" the implementation of the federal regulatory regime established under section 251.[4]

Position of Opposing Parties

In the two joint responses filed in opposition, as identified above, sponsoring parties claim that there is no basis to grant the motions, and that to do so would severely prejudice the interests of CLECs. Opposing parties argue

[3] Ruling at 4.

[4] TRO, Para. 192.

that the ILECs failed to avail themselves of available remedies earlier in the proceeding to obtain necessary data from CLECs, to seek Commission intervention to compel production of discovery, and to seek an extension in the due date for testimony. The UNE-P coalition argues that notwithstanding Commission admonitions to the contrary, and knowing that the burden of production and persuasion would both be theirs in this case, the ILECs waited for over a month. Neither SBC nor Verizon issued any discovery of their own during this period – even though they knew that the data necessary to make any case they wished to make was primarily in the hands of the CLEC respondents to this case.

Opposing parties argue that the ILECs' request for an extension is untimely by waiting until the due date for testimony has arrived to seek approval for an expansion in the scope of testimony. Particularly in view of the magnitude of additional locations and transport routes covered in the expanded scope sought by the ILECs, opposing parties argue that granting the motions would make it impossible for the Commission to complete the proceeding within the mandated nine-month time period while preserving parties due process rights for reasonable time to incorporate the expanded scope of testimony into their own case preparation.

Discussion

Framework of Relevant Issues

The issue of whether the ILECs should be allowed to supplement their testimony with additional loop locations and transport routes raises serious issues including the rights (and responsibilities) of parties, the obligations of the Commission under the TRO, and effects of including the additional scope of testimony on the schedule.

The obligations mandated under the TRO involve both prescribed review tasks and a prescribed nine-month time frame in which to complete those review tasks. The TRO also prescribes a subsequent review phase after the initial nine months as an opportunity for additional review to be performed. The November 20th due date for opening testimony was set in order to permit sufficient time for the initial review of loops and transport to be completed by the nine-month deadline, in coordination with other tasks required within the nine-months (e.g., mass market switching and batch cut issues). An integral part of the adopted schedule also included express obligations on the part of carriers to produce pertinent data and countervailing obligations on recipients of that data to utilize Commission processes to follow up on delinquent or incomplete data responses early enough to maintain the integrity of the nine-month deadline mandate.

The December 15th ruling made certain limited adjustments to the schedule to recognize the delay in receipt of pertinent data on loop and transport routes. The ILECs were permitted to supplement their testimony on a limited basis in view of delays in receiving pertinent discovery from the CLECs. The full scope of supplementation was limited, however, to exclude new locations or routes in view of the nine-month time constraint imposed by the TRO. The ILECs, by their most recent motions, seek reconsideration of this ruling, particularly in light of the significant increases in the number of transport routes and customer locations that they have identified in comparison with their November 20th testimony.

Obligations Under the TRO

The FCC requires state commissions to conduct a granular analysis of high capacity loop and transport impairment for specific customer locations or routes

for which "*sufficient relevant evidence*" has been presented.[5] The November 20th testimony was the designated forum to present "sufficient relevant evidence." The October 8th ALJ ruling informed parties that "[o]nly where a prima facie case is presented for a particular customer-by-customer location by loop type or transport route for any applicable trigger or potential deployment test will further proceedings be necessary."

The ILECs argue, however, that the TRO mandates that the supplemental testimony on additional loop and transport routes must be heard as part of the nine-month proceeding. Verizon argues that evidence regarding additional transport routes and loop locations "*has already been produced*," and provided to staff and parties in response to Commission-ordered discovery. Verizon claims that the Commission is thus *obligated* to gather, review, and assess this additional data under Paragraph 417,[6] even though it exceeds the scope of the November 20th testimony. Verizon argues that to do otherwise would mean that the Commission has failed to act as the FCC intended in fulfilling its obligations under the TRO[7] in making a "complete" analysis. In defining what is meant by a "complete" analysis, the TRO states:

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[5] TRO at ¶ 417, and note 1289.

[6] Paragraph 417 provides in pertinent part that "States that conduct this review need only address routes for which there is relevant evidence *in the proceeding* that the route satisfies one of the triggers or the potential deployment analysis specified in this Part." (TRO, para. 417; emphasis added).

[7] TRO, Para. 190.

> By "complete," we mean that a state commission, upon receiving sufficient evidence, has an affirmative obligation to review the relevant evidence associated with any route submitted by an inter ested party, and to apply the trigger and any other analysis specified in this Part [e.g., the potential deployment analysis] to such evidence.[8]

In view of the Commission's "affirmative obligation" set forth in the TRO to review the relevant evidence that has been produced, the SBC and Verizon motions for reconsideration shall be granted. Accordingly, the supplemental data on additional customer loop locations and transport routes as presented in the proposed testimony of Verizon and SBC shall be permitted to be included within the scope of issues to be heard in this proceeding. At the time that the December 15th ruling was issued, it was not known exactly to what extent the supplemental factual CLEC data yet to be delivered would affect the magnitude of loops and transport routes claimed by the ILECs to satisfy the actual or potential deployment. Now that the CLEC data has been delivered and compiled by the ILECs, the impacts of the additional data on the ILECs' claims is material. Particularly, considering the significant increase in the number of loops and transport routes claimed to meet the TRO criteria as identified in the ILEC supplemental testimony, the record would be materially deficient, and would not reflect a review of actual market conditions if the supplemental testimony was excluded. Consistent with the TRO mandate for the Commission to conduct a granular review of the relevant factual data on loops and transport, therefore, the supplemental data on additional transport routes and customer loop

[8] TRO, Para. 417, note 1289.

locations identified in the ILEC supplemental testimony shall be considered within the scope of the nine-month proceeding.

Effects of the Scope Expansion on the Procedural Schedule

Since the ILEC motions for reconsideration are granted permitting the supplemental data to be considered as part of the nine-month proceeding, the effects on the procedural schedule of adding this additional scope of testimony must be determined. In view of the additional scope of testimony added to the proceeding pursuant to this ruling, parties shall be granted additional time in which to review and prepare reply testimony in response to the supplemental loops and transport data presented by the ILECs. In determining how to adjust the schedule, however, consideration must also be given to maintaining the integrity of the TRO nine-month deadline and to holding parties responsible for their actions that may otherwise compromise timely schedule completion.

Parties bear responsibility to make use of the tools prescribed by the Commission for keeping the proceeding moving. Particularly in view of the mandated nine-month schedule, parties actions (or inactions) that risk schedule delay must be weighed in evaluating how much time they will be allotted. While CLECs were responsible for producing data, the ILECs were responsible to seek Commission intervention to obtain needed data once delays in receipt of certain CLEC data became apparent. By ALJ ruling as early as August 29, 2003, parties were directed to bring discovery disputes to the Commission promptly with a motion to compel in this proceeding. Nonetheless, neither ILEC filed a motion to compel nor requested an extension for submission of testimony on loop and transport issues due to delays in receiving information on loop locations and transport routes.

When the November 12 deadline came for receipt of loop and transport data and the ILECs had no data in hand from the Commission discovery effort, they did not file any Motion with the Commission for reconsideration of the procedural schedule on the grounds of impossibility, due to the unavailability of data.

Moreover, the ILECs were responsible for timely notification of planned deviations from the prescribed scope and schedule in recognition of other parties' due process rights. These measures were required to maintain the integrity of the schedule while preserving parties' due process rights. The ILECs waited until their November 20th testimony was mailed to first make references to incomplete data. Even then, the ILECs did not accompany their testimony with a Motion requesting permission to supplement their testimony later with data obtained from the Commission's extraordinary discovery effort.

Where parties do not use the tools provided to keep the proceeding moving in a balanced fashion, they must accept responsibility for subsequent scheduling difficulties. Particularly because of the shortness of time remaining to complete all of the tasks mandated as part of the nine-month proceeding, it is imperative each party acts promptly to meet its schedule commitments and / or to bring to the Commission's attention any problems perceived as jeopardizing timely completion of the schedule. Any party that unreasonably delays or fails to bring relevant matters to the Commission's attention promptly will bear responsibility for making up out of their own time any losses in the overall schedule's progress.

For purposes of scheduling reply testimony, however, parties shall be granted reasonable time as necessary to review the additional supplemental data that exceeds the scope of what was anticipated by the December 15th ALJ ruling.

The claims of the ILECs are unpersuasive that no schedule extension is necessary to accommodate its supplemental testimony.

Verizon claims that its analysis is not complex, but is simply a mapping and compilation of data from different sources that can be done via a simple spreadsheet. To the extent responding parties or the Commission believe that a schedule change is required if the relief requested is granted, however, Verizon believes an extension of one week is sufficient for submitting expanded reply testimony.

Likewise, SBC claims that permitting consideration of its supplemental testimony on the expanded number of loop locations will not "expand the proceedings." SBC argues that competing providers cannot seriously dispute the veracity of evidence they have provided about their own facilities. SBC characterizes its supplemental testimony on these additional loop locations as a "mechanical step of cutting and pasting, without addition or alliteration, the information in the CLECs' own electronic discovery spreadsheets"

Contrary to the ILECs' characterizations, however, the CLECs express concern that the additional scope of testimony would significantly increase the burden on opposing parties in preparing their case. In the response of AT&T et al., over nine pages are devoted merely to outlining the various technical complexities that must be considered for each of the additional loop locations and transport routes if the testimony is admitted. As noted by AT&T et al., Verizon seeks to increase the number of transport routes being reviewed from 23 to 372, and to increase the number of high capacity loops from zero to 13. SBC is seeking to add 1500 additional separate analyses over the 176 loop locations and 502 transport routes already identified in its November 20th testimony.

In view of the extent of additional analysis identified by the CLECs, there is a legitimate basis for concern that without a reasonable schedule extension, parties will not have sufficient time to prepare their reply testimony to incorporate the added scope proposed by the ILECs.

Verizon claims that the CLECs would not be prejudiced in reviewing and responding to this new information because it is the CLECs' own information. Even if though the data was provided by CLECs on an individual basis, however, they reasonably assumed that new loop and transport routes beyond those in the November 20th testimony were beyond the scope the nine month proceedng. Thus, no CLEC had reason to compile such data for all other CLECs, nor were the CLECs aware that the ILECs intended to challenge the ALJ ruling to include such additional loops and transport routes in this nine-month proceeding until December 30, 2003. The ILECs' failure to make their intentions known until December 30, 2003 placed the CLECs at a disadvantage in focusing efforts on the new data set. On that basis, Verizon's arguments are unpersuasive that the CLECs have had equal opportunity to make use of this information from the time it was produced by Commission staff in mid-November.

In order to minimize the disruption to the existing schedule, while providing a reasonable opportunity for parties to respond the additional supplemental testimony, however, the following adjustments to the schedule shall be adopted. Reply testimony on loops and transport issues shall be due in two separate installments.

The first installment of reply testimony shall address only the scope of ILEC supplemental testimony that was previously permitted under the ALJ ruling of December 15th. This first installment shall continue to be due under the previously set date of January 21st.

The second installment of reply testimony on loop and transport issues shall address the scope of additional ILEC supplemental testimony that is being granted pursuant to the instant ruling. An additional three weeks shall be granted following the January 21st due date for parties to serve their supplemental loop and transport reply testimony. Thus, the supplemental reply testimony shall be due on February 11, 2004.

Evidentiary hearings on loop and transport issues shall be sequenced in the following manner. The ILEC witnesses on loop and transport issues shall be scheduled to appear for cross examination beginning January 26, 2004. For purposes of this phase of the evidentiary hearings, the ILEC witnesses shall only be sponsoring that portion of testimony that was permitted under the December 15th ALJ ruling. Parties shall only conduct cross-examination on that portion of the supplemental testimony, but shall defer questions, if any, on the additional supplemental materials that are the subject of the instant ruling until later, in the hearing schedule. To the extent that cross-examination is necessary on the additional supplemental ILEC testimony that is subject of the instant ruling, it shall be scheduled to occur expeditiously, but only after parties have had sufficient time to review the supplemental testimony on loop and transport issues.

By sequencing the loop and transport reply testimony and cross examination in two separate installments in this manner, the adverse effects on the overall schedule can be minimized while still providing additional time for parties to address the new supplemental testimony within the nine-month proceeding. The delay in parties' reviewing and responding to the new supplemental data thus will not interfere with the previously planned date of January 26, 2004 for the start of evidentiary hearings on the other issues. A

separate companion ruling on adjustments to the overall schedule for evidentiary hearings is being concurrently issued which incorporates these adjustments to the loop and transport schedule.

Conclusion

The motions are granted to expand the nine-month proceeding schedule to include supplemental testimony on triggers and potential deployment relating to new loop locations and transport routes identified in the ILECs' December 30th supplemental testimony beyond those covered in their November 20th testimony. The new portion of the supplemental testimony shall be taken up in the separate installment of reply testimony and hearings as outlined above.

IT IS RULED that:

1. The motions filed by Verizon California Inc. and SBC California are hereby granted for reconsideration and modification of the December 15, 2003 Administrative Law Judge's ruling regarding the loop and transport phase.
2. The schedules shall be adjusted to accommodate as outlined above.

Dated January 12, 2004, at San Francisco, California.

/s/ THOMAS R. PULSIFER
Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail and e-mail this day served a true copy of the original attached Administrative Law Judge's Ruling Granting Motions for Reconsideration of Scope and Schedule for Loop and Transport Issues on all parties of record in this proceeding or their attorneys of record.

Dated January 12, 2004, at San Francisco, California.

/s/ FANNIE SID
Fannie Sid

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.